Refracted Justice: The Imagined Victim and the International Criminal Court

***in* Contested Justice: the Politics and Practice of International Criminal Court Interventions (Ed. De Vos, Kendall, Stahn, Cambridge University Press, forthcoming 2014)**

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May 2014

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1. Introduction

Catastrophic violence seizes our imaginations. As observers and consumers of events taking place "elsewhere," we try to picture what happened and to understand the effects of the violence. We make choices in interpreting events to create meaning from bloodshed. These choices implicate moral, political, and legal considerations. Do we adopt the view of the combatants or victims? If we are the victims, are we innocent of wrongdoing and deserving of justice? Or are we complicit in creating conditions that permitted the atrocities to occur? These are questions that circulate in reporting and policy discussions of mass violence in armed conflict. In many conflicts, a consensus has now emerged among international observers that international criminal justice (ICJ) is a necessary response. The moral foundation of international criminal justice is based on the presumably unassailable premise that those responsible for atrocity crimes should be punished for their acts.

Demanding international criminal justice engages our imagination to these normative questions about who is responsible for the bloodshed through a particular understanding, or theory, of the innocent victim. Victims of mass atrocity crimes are invoked by the protagonists of international criminal justice as one of the primary moral justifications for this unique enterprise. Their suffering mobilizes international politics and justice institutions to hold perpetrators accountable – to identify them, bring them to trial, and punish those who are guilty. The theory of the victim constructed by international criminal justice and implemented most fully by the International Criminal Court ("ICC") affords victims not only moral legitimacy but also legal rights. As figured by the field of international criminal justice, these "imagined" victims demand accountability as the highest value pursued by justice institutions.

Corporeal victims of mass atrocity crimes – those who exist outside of the international criminal justice discourse – may also want to see perpetrators held accountable for their crimes; however, they may not place the highest priority on retributive justice. They often demand other forms of justice as well, including material reparations and other redress associated with restorative justice. The dichotomy of imagined victims and real victims, while imperfect, captures the distance between the way in which international justice discourse constructs victims and the ways in which corporeal victims relate to international criminal justice. Employing the international criminal justice discourse on victims, international courts and tribunals almost unfailingly satisfy imagined victims while just as consistently frustrating the real ones. It is in the process of becoming "real" – with demands and desires that are distinct from the particular form of the international criminal trial – that the tensions between the imagined victim and the real victim surface. In making visible these frictions, a conflict in logics emerges: the logic of the

victim theorized by international criminal justice that excludes the possibility of real victims with demands that diverge from the priorities of the international legal process.

Drawing on insights from critical theory and critical discourse analysis, this chapter contributes to critical reflection on transitional justice mechanisms, including the ICC, and aims to consider the political and social dimensions of international criminal justice.[1] In so doing, it advances two arguments. First, it argues that the theory of the victim generated by international criminal justice produces a particular discourse around or a particular understanding of victims. This imagined victim works to mask the legal subordination of victims by the judicial institutions that derive their legitimacy, in part, through their service to this same constituency. Second, it argues that the imagined victim supports the logics of international criminal justice which limit and render suspect, if not invisible, the particular meanings and desires of real victims for justice. The chapter thus contributes to international discussions of the values of international criminal justice and the ability of the ICC to live up to its moral commitments.

Inclusion of victims into the court is a defining feature of the ICC, and international justice supporters celebrate this newfound status of victims as rights-holders as codifying a broader trend in international law.[2] Furthermore, envisioned as the leading edge in international justice, creators of the new court designed it to combine retributive justice (prosecuting offenders) and restorative justice (including victims in the legal process and authorizing reparations) in a single institution. While a laudable goal, scholars have questioned the ability of

[1] K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009); C. Moon, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (2008).
[2] OTP, Policy Paper on Victims' Participation, 12 April 2010, The Hague, at 1; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (2011), 225; E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?', in D. McGodrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), 1, 315-34.

the court to effectively 'manage the expectations' and experiences of these legal claimants. Critiques largely have emphasized the legal framework applicable to victims and the doctrinal tensions and implementation challenges that result.[3] Consequently, prescriptions favor legal reform and rest on the premise that international criminal justice, if properly adjusted, can realize its moral promises to victims of mass atrocity.

This chapter's analysis is not as optimistic. The ICC seeks to satisfy multiple goals and constituencies. It aims to advance accountability, rule of law, and reconciliation, and to serve the international community, national governments, civil society actors as well as victims. Yet there are tensions among these goals and actors and limits to how well the institution may be able to resolve them. This chapter investigates how in the case of victims, the root causes for the court's shortcomings may be found in the logics of international criminal justice. Although victims are entitled to limited participation in the trial and to seek reparations after a sentence is reached, the legal structure of the ICC prioritizes retributive over restorative justice, punishment over reparations, and the conviction of perpetrators over the character of the charges they face. Looking at trial procedures, victims are framed as a consideration *against which* other rights and values are weighed. Thus the real victims are subordinated to the retributive justice aims of the ICC, and their desires are continually compromised despite their moral centrality to the

[3] See, e.g., War Crimes Research Office, Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court, December 2013; M. Tonellato, 'The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation While Respecting the Rights of the Defendant', (2012) 20 Eur. J. Crime, Criminal Law and Criminal Justice 315; C. Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap', (2012) 10 J. Int'l Crim. Justice 1357; War Crimes Research Office, Ensuring Effective and Efficient Representation of Victims at the International Criminal Court, December 2011; War Crimes Research Office, Victim Participation at the Case Stage of Proceedings, February 2009; War Crimes Research Office, Victim Participation Before the International Criminal Court, December 2007; C. Jorda and J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1, 1387, 1409-16.

integrated justice (retributive and restorative) mission of the Court. This account critically examines the ways in which the ICC discourse about victims facilitates this power dynamic.

The first part of this chapter introduces concepts from critical theory and critical discourse analysis and uses them to examine how courts, prosecutors, and prominent international nongovernmental organizations (INGOs) collectively create an international discourse on victims of international crimes. The second part turns our attention to what are termed "real" or "actual" victims[4] and considers their treatment by the ICC at three points during the trial of Thomas Lubanga, the first case to reach a sentence and a decision on reparations. Through an analysis of the responses of the Court to demands by actual victims, the hierarchy of the imagined victims and the real victims is exposed. Part three employs a critical analysis of the Lubanga trial proceedings to identify the competing logics at work in the ICJ theory of victims and adjudication of international criminal law. Part four discusses some of the implications of the gap between the imagined and real victims. This state of affairs presents normative and prescriptive challenges which this chapter highlights but the resolution of which lies beyond its scope. What is at stake by an instrumental use of victims? What is lost and what might be gained by abandoning our promise to do more than symbolic justice? Part five concludes.

2. The imagined victim

The international criminal justice movement has flourished since the fall of the Berlin Wall and is legitimated through the experiences of victims. The logic of this movement is that atrocity crimes – crimes against humanity, genocide, and war crimes – are harms committed against

[4] This paper will use the term "real" or "actual" victims to refer to embodied individuals who have suffered from atrocity crimes and who exist inside and outside the courtroom. This category is distinct from the way victims are constructed in the international criminal law discourse. This is not to suggest that real or actual victims are somehow authentic victims or that such a category exists. While acknowledging that any understanding of victims always is mediated through acts of interpretation, this paper adopts this dichotomy to expose the particular construction of the victim in the international criminal justice discourse and explore some of its implications.

individuals but are of such gravity that these crimes are considered an affront to humanity, and therefore the international legal order vindicates humanity through punishment of the perpetrators. For these most serious crimes, justice for victims is a universal concern and where justice is not available domestically then justice will be provided through international institutions.

This understanding of victims as deserving recipients of legal justice and morally entitled to accountability has become hardwired into the norms, institutions, and discourse of international justice. International criminal justice has *normalized* this theory of the victim. Identifying some of the processes through which this occurs reveals how power is deployed to generate a hegemonic, imagined victim. This discourse constructs the victim not only as deserving of justice, but also as *demanding* accountability. This understanding of the victim suppresses or deprioritizes other understandings of the victim, as demanding, for example, compensation, or political participation, or non-retributive measures.

2.1. International criminal justice discourse of the victim

Critical discourse analysis, like critical theory, is concerned with exposing the ways that power, ideology, and discourse operate in unexpected ways. Claire Moon's theorization of the role of discourse in reconciliation politics in South Africa is helpful here.[5] She argues that there is a dynamic relationship between discursive practices – meanings generated through institutions and individuals who inhabit them – and the subjects of these practices such that discursive practices are acts of interpretation.[6] These acts of interpretation shape or constitute the way we understand these subjects; subjects do not exist outside of or independent from acts of

[5] Moon, *supra* note 1.
[6] Ibid., at 48-50.

interpretation. Attention to the relationship between discursive practices and social practices reveals the way in which power operates to shape our conceptualization of subjectivity and therefore the possibilities for change.

As described by critical discourse scholars, "discourse is socially constitutive as well as socially conditioned – it constitutes situations, objects of knowledge, and the social identities of and relationships between people and groups of people. It is constitutive both in the sense that it helps to sustain and reproduce the social status quo, and in the sense that it contributes to transforming it. Since discourse is so socially consequential, it gives rise to important issues of power."[7] Borrowing these insights, it is possible to study how victims are conceptualised and theorised in the international criminal justice discourse. This interpretation of the victim also tells us something about how these justice institutions understand victims should be treated.

While a complete critical discourse analysis is beyond the scope of this chapter, legal texts, reports, and policies by international courts and tribunals, speeches by their judges and prosecutors, and statements by INGOs can serve to identify a common discourse about victims of atrocity crimes.

Victims are implicitly invoked in the Security Council resolutions leading to the establishment of UN-sponsored justice institutions that speak of the need to end impunity for atrocity crimes and to restore peace.[8] The principal leaders of international justice institutions

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[7] R. Wodak and M. Meyer, 'Critical Discourse Analysis: History, Agenda, Theory and Methodology', in R. Wodak and M. Meyer (eds.) *Methods of Critical Discourse Analysis* (2009), 1 at 5.

[8] UN Security Council, Resolution 827 (1993), UN Doc. S/RES/827 (1993), available at www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement; UN Security Council, Resolution 955 (1994), UN Doc. S/RES/955 (1994), available at www.unhcr.org/refworld/docid/3b00f2742c.html; UN Security Council, Resolution 1315 (2000) (on establishment of a Special Court for Sierra Leone), UN Doc. S/RES/1315 (2000), available at www.unhcr.org/refworld/docid/3b00f27814.html; General Assembly Resolution 57/228 Khmer Rouge Trials, UN Doc. A/RES/57/228 (2003), available at www.unakrt-online.org/Docs/GA%20Documents/ A-Res-57-228.pdf.

invoke victims as a category of meaning that instantiates the positive value of international justice for victims as well as for humanity, more generally. Victims, by virtue of suffering the wrongful acts of perpetrators, become defined as a group that deserves justice. Justice is always a virtue, a value as well as a tangible product (a conviction after trial) that all societies strive to achieve. International criminal justice stands outside of and above the response of any nation state to violence. It is uniquely capable of speaking in universal terms. The founding legal statutes of its institutions vest the protagonists of international justice – the judges and prosecutors – with symbolic and legal authority to speak on behalf of international justice. Indictments and court orders represent the considered judgments of these international actors about the nature, consequences, and therefore the meaning of the acts for which the accused stand trial. These protagonists are capable of telling us what needs to be done to fulfill these universal goals of justice. As a result, the way in which these actors talk about victims is freighted with meaning.

By aligning the work of international criminal justice with victims, victims become a focal point around which the values and forms of universal justice revolve. Victims become symbolic targets of the observers' aspirations to righteousness. This merger between the values that victims represent and our aspirations to promote these values is potent. This allows the speaker to call upon our sense of moral urgency to respond to victims. The fusion between the imagined victims and moral duty to punish perpetrators serves discursively to call upon international criminal law to do justice on behalf of each member of humanity *as though the imagined injuries to the victim were our own.*

For example, successive presidents of the ICTY invoke victims in the annual reports of the tribunal to the UN Security Council as a measure of the success of the institution; completed

trials deliver justice to victims.[9] The annual reports of the Rwandan tribunal are replete with references to victims. Victims define the social meaning of the tribunal: "[S]eeking justice for the victims continues to drive our commitment to the goal of ensuring that never again will such atrocities occur."[10] Other tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the Special Tribunal for Lebanon, also justify their work as providing "justice to victims."[11] The convergence and consistency of the discourse of the imagined victim is further illustrated by a recent joint statement issued by prosecutors of the UN-sponsored criminal tribunals describing the meaning of their work as "on behalf of the victims in the affected communities."[12]

Similarly, justice protagonists at the ICC – judges and prosecutors – speak of the pursuit of justice by the court in terms of its service to victims. In his 2011 address to the UN General

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[9] 12th Annual Report of the International Tribunal for the Former Yugoslavia, UN Doc. No. A/60/267 – S/2005/532 (2005), available at www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2005_en.pdf; Tenth Annual Report of the International Tribunal for the Former Yugoslavia, UN Doc. No. A/58/297 – S/2003/829 (2003), available at www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2003_en.pdf; Ninth Annual Report of the International Tribunal for the Former Yugoslavia, UN Doc. No. A/57/397 – S/2002/985 (2002), available at www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2002_en.pdf; Sixth Annual Report of the International Tribunal for the Former Yugoslavia, UN Doc. No. A/54/187 – S/1999/846 (1999), available at www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1999_en.pdf.

[10] 16th Annual Report of the International Criminal Tribunal for Rwanda, UN Doc. No. A/66/209 – S/2011/472 (2011), at 20, available at www.unictr.org/Portals/0/English%5CAnnualReports%5Ca-66-209e.pdf; 11th Annual Report of the International Criminal Tribunal for Rwanda, UN Doc. No. A/61/265 – S/2006/658 (2006), available at www.unictr.org/Portals/0/English%5CAnnualReports%5Cs-2006-658.pdf; Third Annual Report of the International Criminal Tribunal for Rwanda, UN Doc. No. A/53/429 – S/1998/857 (1998), available at www.unictr.org/Portals/0/English%5CAnnualReports%5Ca-53-429.pdf.

[11] Opening Speech by the Plenary's President Judge Kong Srim, During the Eighth Plenary of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (13 September 2010), available at www.eccc.gov.kh/sites/default/files/media/8th_plenary_president_speech_EN.pdf; SCSL OTP Press Release, Statement by Prosecutor Brenda J. Hollis, Special Court for Sierra Leone to the United Nations Security Council, 9 October 2012, available at www.sc-sl.org/LinkClick.aspx?fileticket=8TicA8yMb%2fA%3d&tabid=196; Ninth Annual Report of the President of the Special Court for Sierra Leone (2012), available at www.sc-sl.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176; Second Annual Report of the President of the Special Court for Sierra Leone (2005), available at www.sc-sl.org/LinkClick.aspx?fileticket=33ryoRsKMjI%3d&tabid=176; Annual Report, Special Tribunal For Lebanon (2009-2010), available at www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/annual-report-2009-2010.

[12] SCSL OTP Press Release, Sixth Colloquium of International Prosecutors: Joint Statement, 16 May 2011, at 1, available at www.sc-sl.org/LinkClick.aspx?fileticket=TwFuqmhQvS4%3d&tabid=196.

Assembly, ICC President Judge Sang-Hyun Song called upon states to "redouble their efforts" to execute the court's arrest warrants because the failure to bring the indicted to justice was "deeply distressing for the victims."[13] He went on to state that his meetings with victims left him "deeply moved" and affected by their "cries for relief and justice."[14] Luis Moreno Ocampo, the first ICC Prosecutor, frequently spoke of the centrality of victims to the work of international justice.[15] His successor, Fatou Bensouda, continues in the same vein. She explained that her role "is to investigate and prosecute those most responsible for the world's gravest crimes, where no-one else is doing justice for the victims."[16]

A critical analysis of the international justice discourse of victims also highlights how institutional actors at the ICC use the imagined victim simultaneously to legitimate and to garner support for their institutional roles. For example, the ICC Assembly of States Parties (ASP), in recent years has effectively cut the ICC budget by not allocating increased funding as the number of investigations and cases increase. The ICC president regularly appeals to the ASP for increased financial support in part by making the case that the court deserves funding to fulfill its mandate to provide justice to victims.[17] Similarly, the Trust Fund for Victims (TFV), a

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[13] J. S. Song, Address to the United Nations General Assembly, 26 October 2011, at 4, available at www.icc-cpi.int/NR/rdonlyres/D5CA5004-362D-4C37-86D8-01B6F6E7642B/283903/11026ICCPresidentspeechtoUNGAENG.pdf.

[14] Ibid.

[15] See, e.g., L. Moreno-Ocampo, Prosecutor of the ICC, Seventh Diplomatic Briefing, Brussels, 29 June 2006, at 8, available at www.icc-cpi.int/NR/rdonlyres/BD7174D4-6BBF-4A26-BB06-9509E195C29E/278529/DB7St_English.pdf ("At every stage of the judicial process, the Office [of the Prosecutor] will consult with the relevant victims and take their interests into account."); L. Moreno-Ocampo, Prosecutor of the ICC, 18th Diplomatic Briefing, The Hague, 26 April 2010, at 2, available at www.icc-cpi.int/NR/rdonlyres/CA355D60-EC32-467A-8CA6-F7FA93D86C0B/281862/100426LMOspeechdiplomaticbriefing_final.pdf.

[16] ICC Press Briefing, Nairobi, Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda, 22 October 2012, at 3, available at www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otpstatement221012.aspx.

[17] See, e.g., J. S. Song, Remarks to the 18th Diplomatic Briefing, The Hague, 26 April 2010, at 3, available at www.icc-cpi.int/NR/rdonlyres/CA355D60-EC32-467A-8CA6-F7FA93D86C0B/281846/RemarksPresidentEN.pdf, where ICC President Judge Sang-Hyun Song stated: "Victims, affected communities and communities under threat of future crimes should be the primary beneficiaries of the work of the Court and the entire Rome Statute system."

non-judicial entity created under the ICC statute with a dual mandate to provide assistance to victims and to implement court-ordered reparations, frames appeals for support in terms of deserving victims and their centrality to international justice.[18] Although part of the formal apparatus of the ICC, the TFV relies on voluntary contributions rather than annual funding from the ASP to carry out its general assistance mandate. Victims are not so much invoked as they are vividly described in terms of their suffering. Shattered, broken victims are despicted as struggling to rebuild their lives and, with the help of TFV, their hopes for recovery are brighter.[19] In short, victims are an instrumental funding appeal.

The indictment of notorious violators is vital, but indictments without trials leave international justice institutions impotent and potentially irrelevant. Judges and prosecutors at the ICC and other international criminal tribunals publicly hector states to cooperate with them by reminding states that victims are waiting for justice. For example, in addressing the UN Security Council, the ICC Prosecutor reported on the lack of progress in cases, including those against Sudanese President Omar Al-Bashir Bashir and other top officials, and argued for state action to effect arrests, by stating that, with the arrests, "the victims will receive a clear message: they are not ignored."[20]

The constructed meaning of the victim serves to legitimate the normative claims of international criminal justice as well as the claims of institutional actors for greater financial and

[18] See, e.g. Ten Years of International Criminal Court: A Focus on Victims, Tallinn, Estonia, 10 September 2012, Keynote Speech Ms. Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims, 10 September 2012, available at www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/Speech_ER_Tallinn_Sept_2012.pdf.

[19] See, for example, the video on the homepage of the website of the Trust Fund for Victims which includes film and testimony from survivors with visible, disfiguring, conflict-related injuries; available at www.trustfundforvictims.org.

[20] L. Moreno-Ocampo, Prosecutor of the ICC, Press Release, Statement to the United Nations Security Council on the Situation in Darfur UNSCR 1593 (2005), 5 June 2012, at 4, available at www.icc-cpi.int/NR/rdonlyres/CBAD6E54-6C8D-4F43-BE64-74A91C49275D/0/StatementUNSCdarfur5June2011.pdf.

political support to implement their mandates. To acknowledge this instrumental use of the imagined victim clarifies what might be characterized as a self-interested political use of the category by institutional actors, as distinct from how these same actors invoke victims to do other kinds of conceptual work. For example, the international criminal justice discourse on victims suggests that judges, TFV representatives, and prosecutors also employ an understanding of victims as morally deserving and rights bearing subjects. To point out that international justice protagonists deploy the imagined victim in multiple ways acknowledges the dynamic quality of legal discourse and the ways in which those who invoke it do so to legitimate moral values as well as institutional needs.

2.2. INGOs and the imagined victim as a challenge to international criminal justice discourse

The dynamic quality of international criminal justice discourse towards victims also draws attention to resistance or challenges to its construction of imagined victims. The ICC discourse on victims maintains its own form and subjectivity – victims are always the beneficiaries of international justice and the imagined victims are always served by it. However, because the category of the imagined victim is constructed by those who invoke it, its meaning is vulnerable to disruption.

A clear example of this process arises from INGOs that use imagined victims as a tool to hold the institutions of the ICC accountable in particular ways. INGOs participate in the construction of and, to some extent, share the vocabulary of ICC protagonists with regard to the imagined victim. As captured by Human Rights Watch (HRW): “Victims and affected

communities are first among the court's many constituencies."[21] HRW and other INGOs have urged the ICC to respond to their demands for reform that are framed as in the interests of victims. However, unlike the ICC-generated narrative, the INGO construction of the victim does not always assume that justice as implemented by the ICC is synonymous with the justice that victims seek and deserve. An examination of the public statements of INGO leaders in response to the Lubanga judgment illustrates how INGO advocates juxtapose the imagined victims as stakeholders -- a constituency to which the court must answer -- rather than as beneficiaries of the Court's justice.

In March 2012, the ICC Trial Chamber found Thomas Lubanga Dyilo, leader of the rebel group Patriotic Force for the Liberation of the Congo (FPLC), guilty of enlisting and conscripting child soldiers into his forces. The *Lubanga* case took eight years from when the OTP opened the investigation until the Court entered its judgment. Disappointing to many victims and their advocates, the prosecution brought a narrow set of charges regarding child soldiers and refused entreaties to include charges for sexual violence perpetrated by FPLC combatants. In response to the verdict, INGOs explicitly criticized as troubling the fact that the conviction did not reflect the full range of crimes that victims suffered and urged the Court to proactively address this gap by conducting outreach to victims and affected communities.[22] One prominent INGO suggested that the ICC overlooked the victims in favor of technical aspects of justice administration to its detriment: "It is when the quality of proceedings becomes the story

[21] R. Dicker and E. Evenson, 'Letter to Prosecutor-Elect Fatou Bensouda: Priorities for the New International Criminal Court Prosecutor', Human Rights Watch, 8 June 2012, available at www.hrw.org/news/2012/06/08/icc-letter-prosecutor-elect-fatou-bensouda.

[22] First Verdict at the International Criminal Court: The case of Prosecutor vs. Thomas Lubanga Dyilo: Q&A, Human Rights Watch, Febuary 2012, available at www.hrw.org/sites/default/files/related_material/2012_DRC_Lubanga.pdf.

over the vindication of victims' rights that serious concerns arise."[23] By contrast, ICC Prosecutor Luis Moreno-Ocampo claimed that the judgment served victims and justice: "An international court investigated the suffering of some of the most vulnerable members of humanity - children in war zones…. The court provided a fair trial to the suspect and convicted him. It is a victory for humanity."[24]

Victims, as imagined by these INGOs, are the abstracted personification of those to whom international criminal justice should answer; they are held up as a mirror to the ICC. In so doing, INGOs draw attention to ways in which international justice does not satisfy the demands of idealized victims. INGOs are not, in a legal sense, representing victims or their interests. These are organizations that are no more accountable to victims than the judges or prosecutors they criticize. Yet by virtue of their status as independent organizations dedicated to promoting human rights and justice, they are able to claim the moral legitimacy to evaluate international criminal justice – to whom it should be accountable and the metrics by which it should be judged.

This example indicates a few important aspects of what the INGO discourse on victims reveals about the broader discourse of international criminal justice at the ICC. First, the manner in which INGOs invoke victims to challenge the legitimacy of the ICC points to the ways in which the subjectivity of victims is contested. INGOs inject the perspective of a victim that views justice differently from that which the ICC generates and celebrates; this victim is *not* satisfied with a verdict of the Court but names what is missing from the judgment – justice for

[23] P. Seils, 'ICC Asked Tough Questions by Historic First Judgment', ICTJ in Focus, 19 March 2012, available at www.ictj.org/news/icc-asked-tough-questions-historic-first-judgment; see also Coalition for the International Criminal Court Press Release, 'Thomas Lubanga Sentenced to 14 Years Imprisonment in First ICC Trial', 10 July 2012, at 2-3, available at www.coalitionfortheicc.org/documents/CICC_PR_Lubanga_sentencing_10_July_2012.pdf.
[24] International Criminal Court (ICC), 'Lubanga case: Press conference by ICC Prosecutor, 15 March 2012', YouTube: IntlCriminalCourt, 15 March 2012, available at www.youtube.com/watch?v=eoj_qCwHePk.

sexual violence – and asserts a competing claim for what justice means and includes. Second, the ability of INGOs to contest the ICC's imagined victim is circumscribed by international criminal law. The law forecloses certain measures that victims might consider as justice – summary execution, performative atonement – so that the demands of the imagined victim never exceed the Court's mandate. Further, the ICC produces the authoritative, imagined victim through its judgments and statements; it is the Court, not INGOs, that is authorized by law to declare that justice has been done. Thus, the imagined victim of the ICC always legitimates the justice delivered by the Court and works to generate a hegemonic understanding of victims, even as counter-narratives of victims imagined by other stakeholders continue to circulate.

In sum, the major protagonists in international criminal justice – the judges, the prosecutors, and INGOs – claim the privilege of evoking and imagining victims. One might agree with the ways in which victims are imagined just as one might think that atrocity crimes should be punished and perpetrators to be sentenced. It is true that some real victims may share these beliefs and perspectives, but it is also true that others may not. The point is that those who invoke victims (including victim organizations) also construct an imagined victim for particular purposes. It is the "victim as imagined" that is able to carry a moral charge in arguments about what international criminal justice is and what values it serves.

3. Victims in the International Criminal Court

In its strategy statement, the ICC prides itself on its "recognition of victims as actors within the international justice scheme greater than any previous international criminal tribunal."[25] The Court formally combines retributive and restorative justice models. Prosecuting individuals

[25] International Criminal Court (ICC Report), *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45, 18-26 November 2009, para. 1, available at www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf.

responsible for atrocity crimes satisfies punitive goals, and restorative justice is promoted through victim participation in proceedings as well as the reparations scheme. The OTP similarly celebrates that "victims are actors of international justice rather than its passive subjects. Their participation is a statutory right, not a privilege bestowed on a case by case basis."[26] The ICC justifies its inclusive approach on instrumental grounds – participation is good for victims because it improves the quality of their experience of justice and participation is good for justice as victims improve the work of the court.[27] When one examines how the ICC regime established and implemented this statutory regime of the rights of victims, the abstracted, imagined victim gives way to the actual victim. What does one learn about what victims want once they enter criminal proceedings and how do their preferences differ from what the Court and prosecutors imagined them to be?

The Rome Statute affords victims certain rights to participate in the proceedings. They may communicate to the Prosecutor about alleged offenses; they may participate in the judicial proceedings; they may provide evidence to the court as a victim-witness; and they may request reparations. Yet these rights are qualified. While victims may present their "views and concerns" to the ICC,[28] judges have discretion as to when during proceedings victims may provide input, and the Statute stipulates that the judges control the manner in which victims offer their views so that their participation does not infringe on the fair trial rights of the accused.[29] The legal framework for participation reflects competing views and tensions about the relationship of victims to international criminal justice. Advocates for a victim-centered or humanitarian

[26] See OTP, *supra* note 2, at 1.
[27] See ICC Report, *supra* note 25, at paras. 2, 8, 44.
[28] The 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Art. 68(3).
[29] Ibid.

approach pressed for inclusion of victims' rights in the drafting of the Rome Statute.[30] Arguments for victim participation drew on human rights principles regarding victims' rights to truth and justice,[31] both elements of the imagined victim. Others adopted a utilitarian approach that viewed victim participation more skeptically, as a threat to judicial efficiency and as a detraction from the Court's central goal of convicting perpetrators – presaging fears that real victims are impediments to justice.

To some extent, these competing perspectives reflect different legal traditions. In the common law legal tradition, the interests of victims, as the injured parties, are represented by the prosecutor who has the sole responsibility to vindicate the crime as a breach of community norms; victims seeking money damages from a defendant generally must file a separate, private action, to do so. In the civil law tradition, the public law action of the state prosecutor and the private law action of victims to seek reparation for the harm caused by a wrongdoer may be joined in a single proceeding. While the ICC framework contains elements of each tradition within the victim participation provisions as well as more generally,[32] the statute and rules of evidence and procedure are the result of political negotiations among state representatives. The resulting regulatory regime owes perhaps as much to the process of negotiations as to a principled effort to integrate common law and civil law legal traditions. Commentators have

[30] D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and Their Participation in the Proceedings,' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), 1275, at 1275-1281; G. Bitti and H. Friman, 'Participation of Victims in the Proceedings', in R. Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 456, at 456-59.

[31] See Jorda and de Hemptinne, *supra* note 2; see also McGonigle Leyh, *supra* note 2, at 269 n.256.

[32] For example, the investigation stage employs procedures from the common and civil law traditions, while the trial phase more closely tracks common law procedures, and the rules of evidence and appeals follow civil law traditions. See K. Heller, 'The Rome Statute of the International Criminal Court', in K. Heller, M. Dubber (eds.), *The Handbook of Comparative Criminal Law* (2011), 593, 599-601.

noted that the inclusion of participation rights for victims was contentious and NGO advocates played an important role in securing victims' rights in the new Court.[33]

Nevertheless, victims and their advocates have rushed to test the limits of victim participation, and the Lubanga case offers some examples of this dynamic interaction between the imagined and actual victim at the ICC. Victims of Lubanga's forces sought to assert their rights to participate throughout the proceedings. Three junctures in particular – the adjudication of victims' request to participate in investigations, the adjudication of standards for victim participation in judicial proceedings, and the Court's ruling on reparations principles – illuminate this dynamic struggle between the imagined and actual victim.

3.1. Victims and investigations

Under the Rome Statute, the OTP is charged with investigating crimes within the jurisdiction of the court. The question of the nature and extent that victims may influence this process arose in the OTP investigation of the conflict in the Democratic Republic of Congo. A group of six victims filed applications with the Pre-Trial Chamber to participate in the investigation. The Prosecutor objected to the applications, arguing that victims did not have the right under the Statute to participate in proceedings before a suspect is named.[34] In other words, the role of victims – those with direct knowledge of the events under scrutiny – legally lies outside the decision making process concerning which charges to pursue.[35] The Prosecutor saw

[33] See McGonigle Leyh, *supra* note 2, at 235-8.
[34] *Situation in the Democratic Republic of Congo,* Prosecution's Reply on the Applications for Participation 01/04-1/dp-6/dp, ICC-01/04-84 2006-05-16 2/20 SL, 15 August 2005, para. 14; see also *Situation in Darfur, Sudan,* Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0011/06, a/0012/06, a/0013/06, a/0014/06 and a/0015/06 in the Situation in Darfur, the Sudan, ICC-02/05, 8 June 2007.
[35] The OTP more generally has favored a restrictive view of victims' participation and has argued to maintain the exclusive purview of the prosecutor to search for the truth: "That crimes should be effectively investigated and prosecuted is the core of the Prosecutor's mandate." OTP, *supra* note 2, at 10, quoting *Situation in Darfur, Sudan,*

victims as antagonists to the administration of justice. The Pre-Trial Chamber ruled against the Prosecution, holding that the statute afforded victims the right to participate and that consideration of efficiency and due process should be taken into account on a case-by-case basis.[36] The Pre-Trial Chamber drew on human rights principles and jurisprudence in its reasoning, placing the ICC legal framework in the context of international trends expanding the rights of victims.[37]

Despite grounding its decision in the international legal framework of victims as rights-holders – the imagined victim – the extent of their participatory rights was limited. The judges ruled that victims would not have access to the investigation files or be able to attend closed sessions; what "participation" of victims in the investigation meant was that they would be notified of proceedings and could have access to the public documents.[38] In other words, victims had no greater access to information in the possession of the OTP than the general public. The Court, while formally siding with victims, in fact offered a hollow victory. Its decision did nothing to give effect to what victims purportedly wanted: the ability to influence the direction of the investigation and the decision by the Prosecutor regarding which crimes to charge. At the conclusion of the investigation, the Prosecutor did not refer charges for crimes of sexual violence as advocated by many victims' groups, but rather focused on crimes related to Lubanga's

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Prosecution's Document in Support of Appeal Against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, ICC-02/05-125, 18 February 2008, para. 24.

[36] *Situation in the Democratic Republic of the Congo*, Public Redacted Version of Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, paras. 57-58, 70.

[37] Ibid., at paras. 50–54.

[38] Ibid., at paras. 59, 74, 76. The narrow normative victory for victims was curtailed further. In a subsequent ruling the Appeals Chamber agreed, in part, with the position of the Prosecutor and held that investigations are not "judicial proceedings" within the meaning of article 68(3) and therefore victims are not entitled to participate. *Situation in Democratic Republic of the Congo*, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para. 45.

conscription and use of child soldiers, prompting a furious and public response from victims and NGO advocates.[39] The Court has subsequently ruled in several cases and on appeal that the charges against defendants define the limits in which victims have standing to participate in judicial proceedings. Therefore, only victims of the criminal conduct relating to Lubanga's recruitment and use of child soldiers could participate, and only the experiences related to those charges would be relevant to the Court.

3.2. Victims and participation in proceedings

The discrepancy between the desires of some victims of the DRC conflict to see justice for crimes of sexual violence and the decision by the Prosecutor to focus on the use of child soldiers led to repeated efforts by victims to have their views taken into account by the Court. Victims participating in the Lubanga trial requested that the court re-characterize the legal charges against Lubanga to include sexual slavery.[40] The Trial Chamber agreed with the victims, but the Appeal Chamber unanimously reversed and ruled that the Trial Chamber had committed legal error by effectively circumventing the charging documents to allow in new facts after the charges had been confirmed.[41] In the end, the Court sided with the Prosecutor and legally subordinated victims to the vision of justice that the OTP decided to pursue.

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[39] See 'Joint Letter to the Chief Prosecutor of the ICC' from Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition Nationale pour la Cour Pénale Internationale - RCD, Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, International Center for Transitional Justice Redress, and the Women's Initiative for Gender Justice to Chief Prosecutor of the ICC, Luis Moreno Ocampo, on the narrow scope of the charges brought against Mr. Lubanga, 1 August 2006, available at http://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern.

[40] *Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-tENG, paras. 4, 11, 17, 41.

[41] *Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court," No. ICC-01/04-01/06 OA 15 A 16, 8 December 2009, para. 88.

3.3. Victims and reparations

Following its judgment against Lubanga, the Trial Chamber issued its decision on the principles and procedures to be applied to reparations in the case.[42] Unlike the guilt phase of the trial, victims are parties, not "participants," in these proceedings. During the reparations phase, the court determines the harm for which the convicted perpetrator is responsible and the measures to address these wrongs. Reparations encompass a variety of interventions such as compensation, physical and psychological rehabilitation, and other measures to repair the social consequences of atrocity crimes. The Lubanga decision on reparations principles was another jurisprudential first, and the Trial Chamber considered a number of issues regarding the principles that should guide the Court as well as the procedures that will apply in implementing its reparations order. This analysis focuses on the court's decision as to whether reparations should be awarded on an individual or collective basis, as this debate illustrates tensions between the imagined and the actual victim.

What did actual victims want reparations to be and do? Two groups of victim participants filed separate submissions on reparations. Each group favored individual reparations to the participants and advocated that awards should take into account the particular needs of individual victims for economic and psychological assistance.[43] The victim participants acknowledged that child soldiers had different experiences, had suffered a range of harms, and had received different types of assistance post-conflict, all of which the Court should take into account. Their submissions emphasized that variability in benefits might be based on categories of experience

[42] *Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations (Decision), ICC-01/04-01/06-2904, 1.Ch., 7 August 2012.

[43] One group asserted that only victim participants should receive individual reparations, while the other group stated that former child soldiers who did not participate nonetheless should be able to receive individual awards even if such amounts were modest. *Prosecutor v. Thomas Lubanga Dyilo*, Observations on the Sentence and Reparations by Victims (V01 Group), ICC-01/04-01/06-2864, 1.Ch., 18 April 2012, paras. 24-27.

(child soldiers who had been raped, those infected with HIV, those injured), the length of time spent as a child soldier, their level of education, among other factors.[44]

Collective reparations are not defined in the Rome Statute or Court regulations but, as explained by the TFV, collective reparations may include measures that are provided to groups. Some measures may be exclusive, like providing health care to members of a specific group (former child soldiers), or may be provided to a group on a non-exclusive basis, such as schools.[45] Collective reparations, however should "address the harm the victims suffered on an individual and collective basis."[46] Victim participants supported collective reparations in addition to individual reparations. They stressed that collective reparations were needed to reduce the stigma of former child soldiers in their communities, if measures could be issued in a manner that would avoid inadvertently "benefiting" this group and potentially encouraging other youth to enlist in the future.[47]

While acknowledging that the ICC framework permitted the award of individual as well as collective reparations,[48] the Trial Chamber exclusively adopted the community-based approach put forward by the TFV. The judges agreed that in light of the limited TFV funds from voluntary contributions, a community-based approach emphasizing collective awards would have "greater utility" and reduce the administrative costs associated with individual awards.[49] Under this plan the TFV would conduct outreach and consultation with victims and communities

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[44] Ibid., at paras. 28-29; *Prosecutor v. Thomas Lubanga Dyilo*, Observations of the V02 Group of Victims on Sentencing and Reparations (V02 Group), ICC-01/04-01/06-2869, 1.Ch., 18 April 2012, para. 27. Some victim participants felt that they should receive individual awards, in part, because they had assumed a risk to take part in the proceedings. See V01 Group, *supra* note 43, at para. 24.
[45] *Prosecutor v. Thomas Lubanga Dyilo*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012 (TFV Submission), ICC-01/04-01/06-2872, 1.Ch., 25 April 2012, paras. 173-4.
[46] See Decision, *supra* note 42, at para. 221.
[47] See V01 Group, *supra* note 43, at paras. 17-18; see V02 Group, *supra* note 44, at paras. 17-18.
[48] See Decision, *supra* note 42, at paras. 217-21.
[49] Ibid., at para. 274. Lubanga was declared indigent and therefore he would not pay reparations. The award would be financed through the voluntary contributions made to the Trust Fund for Victims.

from which child soldiers were recruited to develop reparations proposals for Court approval.[50] Victims might still receive individual benefits but only if this was included in the community proposal and approved by the ICC.[51]

The imagined victim worked again here to justify abstracted, collective forms of repair and obscured the particular and disparate preferences of individual victims for reparative justice. In adjudicating a reparations framework, the Court could not rely on the trope of an imagined victim who desired simply that the guilty be punished. Rather, it had to deliberate among competing claims and visions of adequate repair advanced by victims who participated in the proceedings and entities, like the TFV, vested with power to speak on their behalf. The Court accepted that collective reparations promising large-scale change were the priority: promoting reconciliation, decreasing the stigma of former child soldiers, and working to change cultural attitudes that support the practice of child soldiers.[52] The victim participants were a fraction of all those who consider themselves victims of the conflict and they may or may not hold views representative of the collective. Adopting an exclusively community-based reparations framework may result in providing a greater benefit to a greater number of victims. It also avoided the Court having to decide among competing claims and being seen as making political choices about which victims to favor. This argument does not seek to deny these legitimate justifications for the decision. The point is that by ignoring the victim participants in the proceedings, the Court imagined victims only in a reductive, collective form that elided their individualism. Once again, the imagined victim -- one who will participate in a community

[50] See TFV Submission, *supra* note 45, at paras. 190-201 and 215-19; see Decision, *supra* note 42, at para. 282.
[51] See Decision, *supra* note 42, at para. 217.
[52] See TFV Submission, *supra* note 45, at paras. 145, 146, 150, 169, 178.

deliberation that was assumed capable of promoting social change -- was satisfied by the Court's utilitarian approach.

The persuasive power of individual victims was negligible by comparison; the submissions of victim participants were not cited in the operative sections of the ruling. How is it that the ICC, which congratulated itself on the pride of place it gives to victims, so neatly has avoided any direct response to them? The Court eschewed a principle of individual awards and outsourced its authority to implement individual benefits. Given how tightly the OTP and the Court guarded their prerogatives to determine retributive justice, the willingness of the judges to divest themselves of power to consider the needs of real victim participants suggests once again that the power of imagined victims outstrips their own.

4. Conflicting logics of international criminal justice

The contrast between the ways in which international criminal justice protagonists such as judges, prosecutors, and INGOs invoke victims and the treatment of claims by actual victims who seek to participate in ICC proceedings is striking. Given that international criminal justice discourse presents victims as *requiring* justice and calls on states and citizens to support the ICC to fulfill this moral promise, it may be surprising that real victims have so little power in an institution celebrated as giving them agency and voice. The clash may be explained, in part, by a clash in logics: the logic of the imagined victim and the logic of international criminal law. These two orderings have fundamentally different relations to victims, even as the same actors are protagonists in each system. The contradiction revealed between the imagined and actual victims thus is embedded in the international criminal justice project.

The imagined victim invoked by the ICC's President, its Prosecutor, and INGO representatives justifies the moral and legal mandate of the Court to hold perpetrators responsible for their crimes. Yet the logic of the narrative of the imagined victim also contains an unspoken but limiting moral commitment to victims: the idea that punishment is a measure *for* the victims. For the imagined victim invoked by the Court, the conviction of the perpetrator completes the moral promise of international criminal justice. The bad actor is called out as a villain on the world stage. The perpetrators did not evade justice but received their just desserts. The moral and legal tasks thus are seen to be complete.

To some extent, this normative assessment may reflect the desires of real victims. Available survey data of victims of atrocity crimes in multiple conflicts indicate that victims believed it was important to hold accountable those who committed crimes.[53] For example, in one study of the DRC, when asked what should happen to those who committed war crimes, 69 percent of victims surveyed said perpetrators should be punished.[54] The idea that those who attack civilians, force communities to flee, and whose acts disrupt the social fabric of communities should be made to answer for their crimes may be a powerful and common sentiment. However, the survey data also indicated that while accountability may be held in high regard as a principle or ideal goal, it appears to occupy a lesser priority than measures designed to improve the immediate, material concerns of victims. When researchers asked respondents to list what were their priorities for the government, justice measures were mentioned by only a small fraction of victims. In eastern Congo, only one percent of respondents felt that the

[53] See, e.g. P. Vinck and P. Pham, 'Building Peace Seeking Justice: A Population-Based Survey on Attitudes About Accountability and Social Reconstruction in the Central African Republic', (2010); P. Pham and P. Vinck, 'Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda', (2010).
[54] P. Vinck et al., 'Living with Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo', (2008) 1 at 43. The term "war crime" was not defined.

government should direct immediate attention to accountability and justice.[55] Respondents overwhelmingly cited the need for improvements to economic and social welfare conditions – job creation, education, health care, and peace – as top priorities. Retributive justice was never strongly expressed as a priority among victims.

These data may not be inconsistent. The moral and material demands of victims are linked: the harms victims suffered and for which they seek justice are directly related to their ability to reestablish stability. Victims may believe that they deserve more than seeing those accountable punished; they deserve material measures that will address their personal losses. These are not inconsistent demands, but rather dual aspirations for how a society will respond to violence. The behavior and views of actual victim participants in Lubanga are consistent with these data: those victims who joined the proceedings wanted to see Lubanga held responsible for his crimes and they wanted individual, material redress for the harms they suffered.

While victims may see retributive and restorative justice as inextricably linked, the ICC does not, despite the lip service it pays to victims. The reparations regime is additive, not essential, to justice defined as punishment of perpetrators. The TFV is financed by voluntary contributions rather than from the core budget of the Court. The organs of the Court define reparations as a separate moral and legal category. Those belong to the domain of restorative justice, distinct from its retributive justice mandate. The institutional design features of the ICC reflect the legal values ascribed to victims by its creators.

Justice thus becomes synonymous with retributive justice. The logic of international criminal law, an adapted version of municipal criminal law, vests a prosecutor and a court with

[55] Ibid., at 27.

the responsibility of administrating justice. The victims may have a discretionary right to participate, as they do at the ICC, but the prosecutor has the responsibility for seeing that justice is delivered. Imagined and actual victims are instrumental to securing justice -- defined as a conviction -- and the judges and prosecutor use them as such. For actual victims to assert otherwise invites the ICC – its judges, its Prosecutor, and TFV -- to instantiate their subordinated status anew, as they did throughout the legal proceedings in Lubanga. The moment that victims become parties is in the reparations phase. Yet here too, victims find their needs are contingent and redefined by a different logic: the logic of scale.

Under the ICC's approach, individual victims will have to persuade their communities that they deserve individual benefits. It is possible that these victims may receive a benefit from collective reparations or that their preferences as expressed to the Court were shaped by their legal representatives and not authentic; in other words, the "interests of victims" may in fact be served by collective reparations. Nevertheless, the logics of scale work against the ICC adopting an individualized process that seeks to respond to the interests of individual victims. The Lubanga chamber was persuaded that individual awards were infeasible and impracticable. Yet it also had convicted an individual of crimes involving thousands of victims. This suggests that international criminal justice is able to master complexity given enough time and resources. While there are important differences between adjudicating individual criminal liability and thousands of damages claims, the ease with which the Court disposed of the possibility of individual awards implies a cost-benefit calculus that privileges retributive justice. Though costly, retribution serves unnumbered, imagined victims; by contrast, individual reparations awards requires a degree of precision and resources greater than the Court can afford.

Such material considerations generally lie outside the normative judgments that criminal courts are required to make. Here, the imagined victim obscures the juridical switch from normative to distributive concerns. Individual reparations were not morally required by the (retributive) justice that the ICC claims imagined victims deserve. The Court thus could dismiss the request of victim participants – and by extension the requests of any victim for individual awards – without violating its moral promise to imagined victims. As of this writing, the reparations decision is being appealed and how reparations are ultimately implemented remains to be seen.

Yet the real victims, the ones who stand outside the international justice discourse, cannot be satisfied even as the discourse of international criminal justice legitimates itself as serving their interests. The scale of the crimes defeats their aspirations for a richer understanding of justice that could include both retributive and restorative dimensions in equal measure. The Lubanga case suggests that international criminal justice may be a process of continual diminishment with regard to real victims. The scale of the crimes is what makes them of concern to the ICC and what activates the moral attention of a world audience. Yet the administration of justice requires the Prosecutor to narrow the legal response to a scale that can be managed. What begins as a call for justice for all victims winds up as retributive justice for select crimes. Furthermore, to manage its inability to provide individual awards of reparations to all victims of the select crimes, the Court eliminates individual reparations altogether. Individual victims are subsumed as a category within their communities.

Whether or not one believes that victims should be treated as a single category for purposes of restorative justice measures, the logic of scale upon which this treatment is based is not explicit in the international criminal justice discourse. Mass violence generates populations

of victims who believe that retributive justice and compensation are important priorities. The ICC framework promises to respond to both, but the logics of scale overwhelm the institutional capacity to deliver fully on either. Not all crimes will be prosecuted and not all victims will be eligible for reparations. Yet the ICC continues to rely on the imagined victim to do important political work to support and legitimate international criminal justice, including soliciting the support of actual victims. This gap between what the discourse promises and what the Court delivers has reputational costs. Therefore it is important to appreciate how the conflict between the logic of retributive justice and the logic of scale threatens the moral legitimacy of the international criminal justice enterprise.

5. Conclusion

Victims of atrocity crimes are central to the project of international criminal justice. They provide the moral urgency to mobilize political will and resources to punish perpetrators and provide redress to victims. The ICC has been celebrated as the first permanent international criminal tribunal that embodies the trends in international law to affirm victims as agents of the global campaign against impunity of atrocity crimes. In the discourse of international criminal justice, victims of mass violence are abstracted, and constructed with particular characteristics. This imagined victim always demands retributive justice and therefore is always satisfied by a conviction, regardless of what real victims believe the most blameworthy conduct is or who is responsible for it. In contrast to the embrace of the imagined victim, the way in which the ICC judges, the OTP, and TFV treated victims in Lubanga highlights the instrumental use of actual victims in international criminal law. Actual victims have limited rights and power to influence justice; they are recipients of retributive justice as defined and secured by the ICC. The scale of

mass crimes means that criminal charges will be selective and that reparations will only ever be partial, and therefore unlikely to meet the expectations of victims of the violence for redress.

This analysis suggests that the contradiction between the promise to victims of international criminal justice and what the field is capable of delivering is generated by the politics of law. The ICC relies on a legitimating discourse that places victims as deserving beneficiaries of justice, even though as a legal institution it cannot deliver justice to all victims. The gap between the discourse of the imagined victim and the administration of international justice in turn generates dashed expectations. To narrow this gap means promising less at the risk of losing support from communities on the ground as well as among states and the public or providing more to actual victims at the risk of bogging down legal proceedings, jeopardizing due process rights of defendants, and becoming unaffordable to the states parties and donors that finance the Court. This chapter does not offer a prescriptive solution. Rather, it calls for sustained attention to this clash of logics and the gap between the imagined and actual victim. Victims are indeed central to justice efforts for atrocity crimes but because *some* victims support *some* forms of justice does not mean that *all* victims support international criminal justice. How the ICC defines justice and its beneficiaries is critical to its success; if the Court makes the promise of justice, it must be capable of fulfilling it.